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SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

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Volume 36 | Number 2

Article 6

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2-1-1958

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## Recommended Citation

Michael H. Cardozo, *A New Footnote in Erie v. Tompkins: "Cannon Is Overruled"*, 36 N.C. L. REV. 181 (1958).

Available at: <http://scholarship.law.unc.edu/nclr/vol36/iss2/6>

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## NOTES AND COMMENTS

### A New Footnote in *Erie v. Tompkins*: "Cannon Is Overruled"

At dawn one recent day I dreamed that St. Peter had granted my request to enter the golden portals to consult Justice Brandeis about a most pressing matter. It was certainly not a bad dream, although it must have had its genesis in my brooding over the opinion in *Berkman v. Ann Lewis Shops*,<sup>1</sup> decided last June by the Second Circuit Court of Appeals. What is surprising is that I escaped a nightmare after reading in the opinion such words as "the leading case of *Cannon Mfg. Co. v. Cudahy Packing*";<sup>2</sup> "the defendant was not 'doing business' within the meaning of that phrase as it was construed in the *Cannon* case";<sup>3</sup> and "we do not believe that the Florida legislature . . . intended to 'overrule' the Cannon rule."<sup>4</sup> Students in my Conflicts classes had often heard me say with much confidence that, after *Erie*,<sup>5</sup> *Cannon* was as obsolete as *Swift v. Tyson*.<sup>6</sup> The common authorship of the opinions in both cases did not negate that conclusion; until the *Erie* revolution, even the most outspoken critics of the "general federal common law" doctrine often joined in decisions and even wrote opinions that applied it.<sup>7</sup> I was sure, however, that, once liberated by his own victory in *Erie v. Tompkins*, Justice Brandeis would be ready to disown his opinion in *Cannon*.

In the *Cannon* case a North Carolina corporation brought an action in North Carolina for breach of contract against a Maine corporation. The statutes of North Carolina then, as they do now, authorized service on a local agent of any foreign corporation "doing business" in the state.<sup>8</sup> The only service on the defendant Maine corporation was effected by delivery of the summons and complaint in North Carolina to the officer in charge of the local operations of an affiliated Alabama corporation doing business in North Carolina. The Alabama corporation was a wholly owned subsidiary of the defendant Maine corporation; they had interlocking directors and officers; they did a great deal of common business. The plaintiff contended that there was such identity of the two corporations that their separate entities should be disregarded

<sup>1</sup> 246 F.2d 44 (2d Cir. 1957).

<sup>2</sup> 267 U.S. 333 (1925). Quotation from 246 F.2d at 47.

<sup>3</sup> 246 F.2d at 47.

<sup>4</sup> *Id.* at 49.

<sup>5</sup> *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

<sup>6</sup> 41 U.S. (16 Pet.) 1 (1842).

<sup>7</sup> See, e.g., Justice Holmes' opinion in *Baltimore & O.R.R. v. Goodman*, 275 U.S. 66 (1927).

<sup>8</sup> C.S. § 1137 (1924); N.C. GEN. STAT. §§ 55-38 (1950), 55-144 (Supp. 1955).

and the business done in North Carolina by the subsidiary should be deemed business done by the parent. After service of the summons the case was removed to the United States District Court on grounds of diversity of citizenship.

The district judge agreed with counsel that the issue was whether, under the facts of the intercorporate relationship, the defendant was to be treated as "doing business" in North Carolina. After carefully analyzing the activities of the two corporations and their officers, he reached the conclusion that there were separate legal entities and that service on the subsidiary was not equivalent to service on the parent. In his opinion, rejecting the attempted service, he cited no state court decisions, but relied heavily on the United States Supreme Court's holding in *Peterson v. Chicago, R. I. & Pac. Ry.*<sup>9</sup> His decision was unanimously affirmed by the Supreme Court,<sup>10</sup> with Justice Brandeis writing an opinion that also referred to no decisions of North Carolina courts. One Alabama decision was cited,<sup>11</sup> but none on the "doing business" issue.

In my dream I climbed "up there" to see if Justice Brandeis would agree that the *Cannon* case should be expressly and ceremoniously interred in the tomb with *Swift v. Tyson*. If the author of the offending opinion felt as I did, and would give some concrete indication of his concurrence, earthly judges, I felt sure, would at long last be constrained to stop relying on its outworn rationale. I was emboldened by the belief that none of the Justice's economic predilections would be offended if the decision as to what is "doing business" were left with the state courts. Perhaps, of course, his conclusion that there was no jurisdiction over the defendant in the *Cannon* case could be traced to his preference for small business units. Nevertheless, he could have had no reason to believe that North Carolina judges would have tended to foster bigness by finding a closer tie between parent and subsidiary than had the federal courts. My plea for a different methodology should not necessarily produce a different substantive outcome.

I was escorted from the pearly gates, so went my dream, to the Brandeis quarters by a messenger with scrawny, almost featherless wings. The great judge, on the other hand, was pillowed by a great mass of white wing feathers as he reclined on a throne-like chair. Except for the feathers, he looked much as one remembered him at the teas served at his Washington home after he retired from the bench.<sup>12</sup>

I commented on the magnificence of his wings and asked how one

<sup>9</sup> 205 U.S. 364 (1907).

<sup>10</sup> *Cannon Mfg. Co. v. Cudahy Packing Co.*, 292 Fed. 169 (W.D.N.C. 1923), *aff'd*, 267 U.S. 333 (1925).

<sup>11</sup> *First Nat'l Bank v. Winchester*, 119 Ala. 168, 24 So. 351 (1898).

<sup>12</sup> See MASON, BRANDEIS: A FREE MAN'S LIFE 603-04 (1946).

obtained such a fine set. He answered that each feather was supposed to represent an achievement during life, and he had, he supposed, been lucky. I then noticed that each feather was marked with a name or title, and I could see the words "*Muller v. Oregon*,"<sup>13</sup> "Savings Bank Life Insurance," and other familiar names here and there. To get to the point of my visit promptly and thus be able to finish before the Justice's personal guardian angel, fluttering near by, should declare the interview over, I asked if by any chance there was a feather for his opinion in *Cannon Mfg. Co. v. Cudahy Packing*.

Justice Brandeis assured me that there was.

"My Secretary pointed out," he said, "that it has been cited over a hundred times,<sup>14</sup> and so he included it in the list when applying for my wings. He insisted that anything cited a hundred times is worthy of a feather in one's wing. But why do you ask about that particular case?"

Then I told him what was troubling me. I pointed out that lower courts have continually relied on *Cannon* to strike down service on a foreign corporation operating in a state only through a subsidiary. The able students on the board of the *Columbia Law Review* have, in an otherwise perceptive comment, called *Cannon* "the leading case in this area" and "still the law today."<sup>15</sup> A leading, up-to-date casebook on Conflict of Laws cites it without a caveat to beware of its possible feet of clay.<sup>16</sup> Even the Supreme Court has since *Erie* used it in a footnote as though it still carried weight.<sup>17</sup> The courts keep citing it to support the principle that such a corporation is not, in the words of the state statute, "doing business" there. With that citation they stop, not considering it necessary to seek state court rulings on the meaning of those words in that particular statute.<sup>18</sup> In at least one horrible example,<sup>19</sup> a district judge had analyzed the law of North Carolina—*Cannon's* own state—and had found that the defendant before him had been engaged in activities that he thought the North Carolina courts would have found to be "doing business" there. Then he said, "For what the law actually is, however, I must consider the decision of the United States Supreme Court in *Cannon Manufacturing v. Cudahy Packing Co.* . . . The *Cannon Case* has not been overruled and . . . , not being distinguishable so far

<sup>13</sup> 208 U.S. 412 (1908).

<sup>14</sup> See SHEPARD'S UNITED STATES CITATIONS (Case ed. 1943 and Supps. 1952, 1956, 1957).

<sup>15</sup> Note, 56 COLUM. L. REV. 394, 409 (1956).

<sup>16</sup> CHEATHAM, GOODRICH, GRISWOLD AND REECE, CONFLICT OF LAWS: CASES AND MATERIALS 129 (1957).

<sup>17</sup> National Carbide Corp. v. Commissioner, 336 U.S. 422, 439, n. 31 (1949).

<sup>18</sup> See, e.g., LeVecke v. Griesedieck Western Brewery Co., 233 F.2d 772, 776 (9th Cir. 1956).

<sup>19</sup> Harris v. Deere & Co., 128 F. Supp. 799 (E.D.N.C. 1955), *aff'd*, 223 F.2d 161 (4th Cir. 1955).

as I can see, seems to settle the question and requires me to hold with the defendant."<sup>20</sup>

I asked Justice Brandeis if this course of action did not strike him as committing the pre-*Erie* error of assuming the existence of "a transcendental body of law outside of any particular state."<sup>21</sup> He listened with his renowned politeness as I cited a number of recent cases that have treated, rightly, it seemed to me, the issue whether a defendant is "doing business" in the state as a question exclusively of state law.<sup>22</sup> *Bomze v. Nardis Sportswear*<sup>23</sup> is a good example. Judge Learned Hand there said that "the first question is whether the service was valid under the New York decisions. . . . [I]f we conclude that it was, there arises the second question: i.e., whether the service was valid under the Constitution."<sup>24</sup> Farther along in the opinion Judge Hand seems to have been expressing doubt as to the validity of the *Cannon* approach, for he said of another case,<sup>25</sup> "In any event the majority cited only federal decisions, and apparently proceeded on the assumption that these were conclusive . . ."<sup>26</sup> His whole opinion reflected the view that the *International Shoe* case<sup>27</sup> was not an interpretation of a state statute, but a test of the constitutionality of the state's interpretation of its own law.

The premise of my plea, I pointed out to Justice Brandeis, was that the Court in *International Shoe* was merely holding that a state does not exceed its jurisdictional powers if it interprets the "doing business" phrase in its statute as including the kind of activities found in that case. The Supreme Court certainly was not suggesting that the question of what constitutes "doing business" is a matter of "general law" that a federal court can find as readily as a state court. It expressly accepted, I continued, the statutory interpretation previously declared by the state court. It was a state statute they were interpreting, and in the words of Justice Frankfurter in another case, the last word on its meaning

<sup>20</sup> *Id.* at 804-05.

<sup>21</sup> *Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co.*, 267 U.S. 518, 533 (1928); *Erie R.R. v. Tompkins*, 304 U.S. 64, 79 (1938).

<sup>22</sup> *Riverbank Laboratories v. Hardwood Products Corp.*, 220 F.2d 465 (7th Cir. 1955); *Partin v. Michaels Art Bronze Co.*, 202 F.2d 541 (3d Cir. 1953); *Pulson v. American Rolling Mill Co.*, 170 F.2d 193 (1st Cir. 1948); *Hilmes v. Marlin Firearms Co.*, 136 F. Supp. 307 (D. Minn. 1955); *Solt v. Interstate Folding Box Co.*, 133 F. Supp. 7 (E.D. Pa. 1955); *Kenny v. Alaska Airlines*, 132 F. Supp. 838 (S.D. Cal. 1955); *Radford v. Minnesota Mining & Mfg. Co.*, 128 F. Supp. 775 (E.D. Tenn. 1955). See also *Roberts v. Evans Case Co.*, 218 F.2d 893 (7th Cir. 1955).

<sup>23</sup> 165 F.2d 33 (2d Cir. 1948).

<sup>24</sup> *Id.* at 35.

<sup>25</sup> *Deutsch v. Hoge*, 146 F.2d 201 (2d Cir. 1944).

<sup>26</sup> 165 F.2d at 37.

<sup>27</sup> *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

belonged neither to the Supreme Court of the United States nor any other federal court, but to the supreme court of the state.<sup>28</sup>

The Justice seemed ready to comment, and, though still dreaming, I awaited his words anxiously. I had staked a lot to get his help in eliminating one aberration in the twisted course of private international law.

"Of course," Justice Brandeis observed, "*Erie v. Tompkins* itself dealt with the common law, not with statutory interpretation. Still, I imagine that if *Cannon* had come up after the *Erie* doctrine had finally been accepted, my colleagues and I should have used a very different approach. We surely should have sought state decisions as guides for interpretation of the North Carolina statute. We should then have tested that interpretation against constitutional restraints, as the Court later did in *International Shoe*. But isn't it a bit late to recognize all this? Even the *Erie* case couldn't overthrow *res judicata*."

I agreed that *Cannon* could not be reversed, but I pointed out that it could be overruled. I said that, for myself, it seemed effectively overruled by the words in *Erie* that the unconstitutionality of the *Swift v. Tyson* doctrine compelled the final abandonment of that ancient precedent. The bar and the courts, however, have too often not seen the cases in that light. Since I am among those who welcome the *Erie* rule twenty years later, I like to see it applied wherever it belongs, and therefore, I told the Justice, I hoped something could be done to eliminate the *Cannon* blot on the symmetry of the juridical scutcheon. I concluded that I was certain that a few words attributed to him would have the desired effect.

A discouraging look of doubt clouded the Justice's face. I then waxed eloquent even in my dream, and recalled some of his own expressed views on the importance of bringing judicial opinions into agreement with experience.<sup>29</sup> "[I]t behooves us to reject, as guides," he once said, "the decisions . . . which prove to have been mistaken,"<sup>30</sup> especially where the precedent involves application rather than interpretation of the Constitution, and where no rule of property was created, around which vested interests had clustered.<sup>31</sup> "It was you, Justice Brandeis," I emphasized, "who first said that *stare decisis*, while ordinarily a wise rule of action, 'is not a universal, inexorable command.'"<sup>32</sup> More than once, I added, he had listed examples of overrulings by his

<sup>28</sup> *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 499-500 (1941).

<sup>29</sup> *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 410 (1932) (dissenting opinion).

<sup>30</sup> *Di Santo v. Pennsylvania*, 273 U.S. 34, 42 (1927) (dissenting opinion).

<sup>31</sup> *Washington v. Dawson Co.*, 264 U.S. 219, 238 (1924) (dissenting opinion).

<sup>32</sup> *Ibid.*

Court, and I reminded him that in the *Gobitis*<sup>33</sup> and *Barnette*<sup>34</sup> cases some of the Justices had perceived the error of their own decision and had joined in overruling it three years later.<sup>35</sup>

"How I welcomed that action," interjected the Justice. "Black and Douglas slipped as grievously in *Gobitis* as Holmes had done in the Nebraska German language case.<sup>36</sup> As I have often repeated, every man has his weak moments, and man's judgment is at best fallible.<sup>37</sup> But when he has seen his mistake, it is right to correct it. Perhaps the *Cannon* decision was correct in the climate of its day, but I agree that it cannot survive into the post-*Erie* era. However, in my present position, what can I do about it?"

Dreaming boldly along, I explained my idea of a new footnote to be inserted in the *Erie* opinion, citing *Cannon* as one of the errors resulting from the invalid doctrine of *Swift v. Tyson*. Not surprisingly, in the phantasy of the dream, the Justice agreed to the proposal.

I smiled a dreamy smile, picturing myself citing the new footnote as a long overdue epitaph for *Cannon*. As I bid the Justice good-bye, he picked off the floor and handed me a lovely white feather, labelled "*Cannon v. Cudahy Packing Co.*" Its base had begun to disintegrate, causing it to drop off one of his wings.

When I awakened, I resolved to write the story of my dream in the hope that there would be some readers who would recognize the soundness of its message and would help to make it come true.

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### Constitutional Law—Due Process— Denial of Admission to State Bar on Ground of Communist Affiliation

In *Konigsberg v. State Bar*,<sup>1</sup> the United States Supreme Court in a five to three decision held that past membership in the Communist Party is not in itself an adequate basis for denying an otherwise qualified applicant admission to a state bar. Because the petitioner had refused to answer questions of the California Committee of Bar Examiners concerning past membership in the Communist Party, the Committee refused to certify him to practice law on the grounds that he had failed to prove (1) that he was of good moral character, and (2) that he did not

<sup>33</sup> *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940).

<sup>34</sup> *Board of Education v. Barnette*, 319 U.S. 624 (1943).

<sup>35</sup> See also *Reid v. Covert*, 354 U.S. 1 (1957).

<sup>36</sup> *Bartels v. Iowa*, 262 U.S. 404, 412 (1923) (dissenting opinion); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>37</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310 (1932) (dissenting opinion).

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<sup>1</sup> 353 U.S. 252 (1957).